IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. _____

RUFUS ROLAND FAULK ..... *Appellant*

vs.

STATE OF ARKANSAS ..... *Appellee*

ON APPEAL FROM THE
SUPREME COURT OF ARKANSAS

MOTION TO DISMISS OR AFFIRM

The Appellee, pursuant to Rule 16 of the Rules of the United States Supreme Court, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Arkansas on the ground that the questions on which the decision of the cause depend are so manifestly unsubstantial that further argument is unwarranted.

I.

THE STATE STATUTES AND RULES INVOLVED AND THE NATURE OF THE CASE.

A.

STATE STATUTES AND RULES

This appeal questions the validity and constitutionality of Arkansas' statutes and rules of criminal procedure relating to the right of an accused to a speedy trial, particularly as the statutes and rules have been applied to Appellant. The Arkansas statutes involved are Ark. Stat. Ann. §§43-1708 and 43-1709 (Repl. 1964). These statutes can be found in Volume 4A at pages 130-131 of the Arkansas Statutes Annotated, 1964 replacement (Official Edition). The Arkansas Rule of Criminal Procedure involved is Rule 28. Arkansas' Rules of Criminal Procedure are not legislative enactments but rather are rules which have been promulgated by the Arkansas Supreme Court pursuant to a legislative grant of authority and in exercise of its supervisory powers conferred by the Arkansas Constitution. The Rules were adopted by PER CURIAM order of the Arkansas Supreme Court on December 22, 1975. The rules, which became effective January 1, 1976, govern the trial of all criminal cases in the inferior courts of the State of Arkansas having criminal jurisdiction. Rule 28 of the Arkansas Rules of Criminal Procedure can be found at pages 59 and 60 of the printed rules (Official Edition). The statutes and rules here involved have been set out verbatim in Appellant's Jurisdictional Statement.

Arkansas law distinguishes between an incarcerated person and a person free on bail for purposes of computing or quantifying an accused person's right to a speedy trial. Under the provisions of Ark. Stat. Ann. § 43-1708 (Repl. 1964) a person incarcerated in a prison or jail within the State of Arkansas must be brought to trial on the offense for which he is incarcerated before the expiration of two terms of the court having jurisdiction of the offense. If a trial is not had within the specified time frame the accused person is entitled to be discharged as to the offense for which he was incarcerated. The statute does not allow discharge on speedy trial grounds where, as in a motion for continuance, the delay in the trial was occasioned by the prisoner.

Likewise, Ark. Stat. Ann. §43-1709 (Repl. 1964) provides that a person that has been indicted or charged with an offense and released on bail must be brought to trial on the offense charged before the expiration of three terms of the court having jurisdiction of the offense. Failure to comply with this provision entitles the accused to discharge as to the offense charged. As with §43-1708, discharge on speedy trial grounds is precluded where the delay in the trial happened on the application of the accused.

Rule 28 of the Arkansas Rules of Criminal Procedure essentially restates the statutory provisions mentioned above. The Rule does, however, specify in much greater detail the periods of time which are "excluded" in computing the time for trial. Furthermore, Rule 28 has no effect in those cases which are expressly governed by the "Interstate Agreement on Detainers Act" (Act 705 of 1971).

B.

THE PROCEEDINGS BELOW

The Appellant and co-defendant, were charged by felony information on February 11, 1975, with the offenses of forgery and uttering in violation of Ark. Stat. Ann. § 41-1806. The charges were filed in the Fort Smith District of the Sebastian County Circuit Court.

The case was set for trial for April 15, 1975. The co-defendant Belt entered a plea of guilty and was sentenced to a term of years in the Arkansas Department of Correction. The appellant moved that his attorney Jack Rose be removed, and moved for a continuance, both of which were granted.

On May 21, 1975, appellant's trial was reset for June 16, 1975. Notice of the new trial setting was sent to appellant's attorney, Robert Blatt. On May 28, 1975, appellant made bond and on June 2, 1975, he voluntarily submitted himself to Oklahoma authorities.

On June 9, 1975, appellant pleaded guilty in Oklahoma to charges of unlawful distribution of a controlled substance, and was sentenced to a term of two (2) years in the Oklahoma State Penitentiary.

Upon learning of appellant's incarceration in Oklahoma, Prosecuting Attorney Charles Karr immediately requested extradition in an attempt to meet the June 16, 1975, trial date.

On June 18, 1975, the Governor of Oklahoma honored the

extradition and ordered Appellant returned to Arkansas for trial.

Appellant's trial was set for a third time for July 14, 1975. The state asked for a one week continuance, for an out-of-town witness, which was granted. The trial was therefore set for July 21, 1975.

Appellant filed a Petition for Writ of Habeas Corpus in the Pittsburg County (Oklahoma) District Court to prevent the extradition. This writ was denied and the appellant appealed to the Oklahoma Court of Criminal Appeals.

The July 21 trial date passed and the State of Arkansas had no notice of the judgment of the Oklahoma appellate court. The judgment was made and the writ denied on July 29, 1975.

From this time through the next year, appellant made no request for trial as required by Arkansas Rule of Criminal Procedure 29.1(c) and the Interstate Detainer Act, Ark. Stat. Ann. § 43-3201 (Supp. 1975).

On September 24, 1976, appellant's trial was set for October 14, 1976. On October 6, 1976, appellant filed a Motion to Dismiss because of a denial of speedy trial. On October 20, 1976, a hearing was held and the court denied the motion.

Appellant waived trial by jury, and the trial court heard the evidence and found the appellant not guilty of forgery and guilty of uttering. On October 20, 1976, judgment was entered and appellant was sentenced to a term of five (5) years in the Arkansas Department of Correction.

Appellant subsequently appealed to the Arkansas Supreme Court contending that he had been denied a speedy trial. The Arkansas Supreme Court, in its opinion handed down May 2, 1977, held that Appellant had caused the delay in his trial by leaving the State and thereafter resisting extradition. The Court further held that a person incarcerated in another state must make demand for trial before the speedy trial provisions of Ark. Stat. Ann. §43-1708 (Repl. 1964) are activiated. In the present case, Appellant did not demand a trial for some fourteen (14) months after his efforts to resist extradition had failed, nor did the State of Arkansas ever receive notice that extradition proceedings had terminated. Following the affirmance of his conviction, Appellant petitioned the Supreme Court of Arkansas for rehearing. Appellant's petition for rehearing was denied in a substitute corrected opinion handed down June 13, 1977.

II.

THE CASE PRESENTS NO SUBSTANTIAL QUESTION PREVIOUSLY UNDECIDED BY THIS COURT.

The Arkansas Supreme Court has consistently followed the mandate of this Court's decision in ***Barker*** v. ***Wingo,*** 407 U.S. 514 (1972). See ***Curan*** v. ***State,*** 260 Ark. 461, 541 S.W. 2d 923 (1976). In ***Barker, supra,*** this Court declined to impose a quantified time limit on the right to a speedy trial as it pertained to state criminal proceedings. This Court wisely opted to adopt more flexible criteria in determining whether there had been a denial of the right to a speedy trial. According to this Court's decision in ***Barker, supra,*** each case must be considered on an ***ad hoc*** basis and certain factors scrutinized. Those factors

include length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. The Supreme Court of Arkansas reviewed each of these factors in the present case and resolved them against Appellant.

If this Court decided to review the present case, the review would merely consist of an examination of the factual findings of the Arkansas Supreme Court, a practice in which this Court has previously declined to participate. ***Grayson*** v. ***Harris,*** 267 U.S. 352 (1924); ***Portland R. Co.*** v. ***Railroad Commission,*** 229 U.S. 397 (1912); ***Fry Roofing Co.*** v. ***Wood,*** 344 U.S. 157 (1952). The Supreme Court of Arkansas examined the record in the present case and found, essentially, that Appellant's conduct had caused the delay of which he now complains. This case is remarkably analagous to the adage "you can't have your cake and eat it too." Aside from this tenuous bit of literary merit, the case has none.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depends are so unsubstantial that further argument is unwarranted, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Arkansas.

Respectfully submitted,

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BY: _____

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JUSTICE BUILDING
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CERTIFICATE OF SERVICE

I, Robert Alston Newcomb, attorney for Appellee, do hereby certify that a copy of the foregoing Motion to Dismiss or Affirm, has been served upon the appellant by placing a copy of the foregoing in the United States mail, first class, postage prepaid to the Honorable Robert S. Blatt, attorney for appellant, P. O. Box 1825, Fort Smith, Arkansas 72901, on this 22nd day of August, 1977.

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ROBERT ALSTON NEWCOMB
Attorney for Appellee